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THE OCEANS

BENEDICT P. KUEHNE*

LAW OF THE SEA CONFERENCE

The fifth substantive session of the Third United Nations Conference on the Law of the Sea resumed in New York City on August 2, 1976. As of this writing, the Conference is still in the "private negotiation" stage, and consequently, few results have been made public. The outcome of the Conference will be fully reported by the *Lawyer of the Americas* as soon as details are released.

Report on the Opening Plenary Meeting of the Fifth Session

The opening plenary meeting was brought to order by Conference President Amerisinghe. The topic of discussion was the organization of the negotiations. The President had prepared and distributed a document proposing a "key issues" negotiating procedure, intended as a point of departure for a discussion of changes in the negotiation apparatus. In an effort to streamline the Conference, he proposed that the actual negotiations be done by small working groups within each of the three committees on certain key issues. The composition of the groups and the issues to be discussed would be determined by the committee chairmen. The President would then meet with the chairmen every other day in order to discuss the movement of the Conference.

This proposal was discussed extensively. Fourteen delegations took the floor to comment: nine were generally favorable, four commented unfavorably, and one was totally opposed. The positions will be sum-

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The assistance of Walter P. Stepien, Jr., J.D. Candidate and Research Assistant, Ocean and Coastal Law Program, University of Miami School of Law, in the preparation of the report on the Law of the Sea Conference is greatly appreciated.

Special thanks is given to United States Ambassador Thomas A. Clingan, Jr., who made it possible for Mr. Stepien to attend the opening plenary session of the Conference.

marized briefly, and comments of states within the Americas will be more fully discussed. Commenting favorably on the proposal were Chile, the People's Republic of China, Greece, Peru, Sri Lanka, Tanzania, the U.S.S.R., the United States, and Yemen. Sri Lanka offered a refinement to the proposal, described as an arena method, whereby the small working groups would meet in view of the full Committee.

Commenting unfavorably were Egypt, Ecuador, Guatemala, and Tunisia. Egypt and Tunisia both felt that the real power should reside in the membership of the three committees, and not in the chairmen. Turkey not only spoke in total opposition to the proposal, but threatened to walk out. The Turkish delegation accused the President of dictatorial tactics and termed the key issues method totally unsatisfactory.

Chile, Ecuador, Guatemala, Peru and the United States each made comments on the proposal. Chile was strongly supportive of the proposal and favored a strong role for the committee chairmen in order that the Conference proceed smoothly toward a close. Ecuador commented unfavorably, noting that the real power should remain in the membership of the committees. Ecuador further opposed any attempt to cut short the renegotiation of issues discussed at prior sessions. In particular, Ecuador wanted the extension of the territorial sea and the nature of the economic zone to be key issues, and stated that the treatment of highly migratory species in the Single Negotiating Text was unacceptable.

Guatemala expressed some doubts about the arena method and warned against simultaneous negotiations which could create manpower problems for the smaller delegations. The spokesman urged that the Conference not waste time and encouraged both the frank exchange of views and readiness to compromise. Peru supported the proposal, pointing out that the discussion paper was not binding on anyone, and thus there was no need for alarm or extended discussion at this time. The United States, in general agreement with the proposal, simply requested a clarification of certain sections of the motion.

The sense of the Conference was that some version of the "key issues" proposal would be adopted by each of the three committees for this session of the Conference. Most delegations regarded it as a workable procedure for addressing the more difficult issues which remain from prior sessions. The prevailing mood of the Conference is one of getting down to work, which raises hopes for a productive six-week session.

While the overall mood of the Conference is one of optimism, several difficult and highly contested issues remain to be settled. The divisive question of deep seabed mining is the main topic of discussion for Committee I. The high economic stakes and the prospects of building lucrative mining industries have pitted the economically advanced and developing nations against each other. Developing nations generally favor a strong international Authority which would control all ocean floor activities, to the benefit of the lesser developed countries. The industrially advanced nations, on the other hand, having the capacity to immediately begin exploitation of seabed minerals, favor a less powerful Authority. Also at issue is the status of the waters within the proposed 200-mile economic zone, and the resolution of the claim of the landlocked and geographically disadvantaged states for access to both the living and non-living resources of the adjacent coastal states, and transit through these states to accommodate that right. If these difficult issues are successfully resolved, the stage could be set for a final meeting of the Conference in 1977.

Report on the Fourth Session

The fourth session of the Conference, which met in New York from March 15 through May 7, closed with modest progress toward a consensus on many of the issues. The slow movement of the Conference is understandable, given the complex and politically sensitive character of the negotiations. The basis of discussion at the Conference was the Informal Single Negotiating Text (SNT) prepared by the chairmen of the main committees and by the Conference President with respect to dispute settlement. At the conclusion of the fourth session, a revised SNT, taking into account the discussions and negotiations at this session, was released to the delegates. The revised text is the basic working document used in the fifth session.

Negotiations behind closed doors and debate in the few public meetings concentrated on the possible extension of the territorial sea from the present internationally recognized three miles to a proposed twelve miles; the concept of an exclusive economic zone beyond the territorial sea to a limit of 200 miles offshore; deepsea mining of the ocean floor; passage through straits; and regulations affecting ocean-based pollution and fisheries. The revised SNT contains what is believed by the committee chairmen to be the major direction of the conferees with regard to basic substantive issues.

Committee I—The focus of the new text is primarily on developing rules for exploration and exploitation of the deep ocean floor and defining

the power of the Authority, the international body which will oversee activities on the seabed. The Committee text presents refined ideas with respect to accommodating the interests of the developing countries, the industrialized countries, consumers and producers. Specifically, it proposes conditions under which states and their nationals would have access to seabed minerals, and establishes a system under which prime mining sites would be reserved for exploitation by the Enterprise (the working arm of the Authority) and developing countries. The text also contains provisions designed to protect developing countries whose land-based production of metals could be hurt by seabed exploitation. The text points out that the important question of the composition and voting of the Council of the Seabed Authority has not yet been fully dealt with by the Committee.

Committee II—The scope of the second Committee is with the more traditional areas of ocean law, including navigation, fishing, and the definition of the various emerging jurisdictional zones. During the Conference, Committee II completely reviewed all of the articles. The overall impression of the discussion was that the Committee II SNT was broadly acceptable. Among the major issues still demanding resolution include the judicial status of the exclusive economic zone as high seas or otherwise, access to the sea by landlocked and geographically disadvantaged states, and delimitation of the economic zone and continental shelf boundaries between opposite and adjacent states.

Committee III—Pollution and marine scientific research are the concern of the third Committee. The changes in the revised text relating to pollution focus largely on vessel-source pollution, and include specific enforcement rights for port states for violations of international discharge regulations, and specify coastal state enforcement with respect to discharges in the economic zone. In the area of scientific research, the text establishes a regime of coastal state consent for research conducted in the economic zone or on the continental shelf, provided that consent shall not be unreasonably withheld.

Dispute Settlement—Effective provisions for the binding settlement of disputes occasioned by the interpretation or application of the pact are an essential part of the negotiated package. The text adopts a formula-type approach whereby a state may choose among the following procedures in situations in which it would be subject to suit: a) arbitration; b) the International Court of Justice; c) a proposed Law of the Sea Tribunal; or d) specialized procedures for particular disputes.

FISHERIES

Canada

Enforcement of Canada's new 200-mile fishing zone, to take effect as of January 1, 1977, is proceeding through strengthening of fisheries patrols. Environment Canada's Fisheries and Marine Service, the primary Canadian enforcement arm, will rely on ships and aircraft for both visual surveillance and boardings of vessels at sea. A special budget of \$4 million has been approved for operation and maintenance of the required fisheries sea patrols which will be doubled to approximately 2,000 sea-days for vessels and more than 4,000 aircraft hours per year for aerial observation of fishing banks.

Canada and Spain have signed a bilateral fisheries agreement negotiated earlier this year, setting out the terms and conditions governing continued fishing by Spanish vessels in areas off the Canadian coast which will come within Canadian jurisdiction.

Soviet fishing vessels, having been denied access to Canadian ports last year, will now be able to visit ports to take on supplies and make repairs. This was the result of a renewable six-year fisheries agreement entered into recently between Canada and the Soviet Union. The text of the agreement, including fishing quotas, has not yet been made public.

Cuba

Cuba has applied for fishing rights in the North Sea and the English Channel. The request, made to the Northeast Atlantic Fisheries Commission, immediately followed notice from Canada that Cuba could no longer catch fish in the northwest Atlantic. Cuba requested a quota of 1,000 tons of herring and 1,000 tons of mackerel in the North Sea, 3,000 tons of mackerel off Cornwall, 4,000 tons of cod in the White Sea, where Britain has traditional fishing rights, and access to fishing areas off the Spanish, French and Portuguese coasts.

The Commission has not been very effective in setting quotas in the past, and the Cuban request is expected to make matters more difficult. The British fishing industry, concerned with depleting stocks in the North Sea and English Channel, hopes that international recognition of a 200-mile fishing zone at the U.N. Law of the Sea Conference will make both the Northeast Atlantic Fisheries Commission and the Cuban request outdated.

The Cuban interest in far-ranging fishing is a result of a massive investment program, which will soon include twenty-one new factory trawlers, being built in Spain. With the addition of this new equipment, Cuba's freezer fleet will almost double that of Britain.

In addition, Cuba has received assurances from the present Angolan government that Cuba will have privileged access to its 200-mile fishing area if the United Nations officially endorses the extended zones at the Law of the Sea Conference.

European Common Market

Foreign ministers of the European Common Market agreed to declare a uniform 200-mile territorial sea limit. The decision was made in order to present a joint Common Market position to the U.N. Law of the Sea Conference.

Great Britain especially welcomed the agreement to establish the zone, in part because of expansion of fishing fleets by the Soviet Union and Cuba and recent requests by Cuba for permission to fish in the North Sea and English Channel. Combined action by the Common Market partners in negotiating fisheries quotas will also serve to strengthen enforcement of these agreements.

Guatemala

The Camara Parliament has adopted a resolution declaring that Guatemala possesses a 200-mile patrimonial sea and a 12-mile territorial sea. Decree 20-76 gives Guatemala exclusive rights in the 200-mile zone for exploration and exploitation, conservation and administration of the natural living and non-living resources contained therein. Guatemala also retains exclusive jurisdiction to regulate all activities by other states regarding the economic exploitation of the zone pursuant to agreements allowing other countries access.

Iceland

Iceland's "cod war" with Great Britain has at long last come to a temporary conclusion. British warships pulled out of Iceland's unilaterally-declared 200-mile fishing zone, paving the way for a bilateral settlement. The agreement, designed to last until December 1, allows 24 British trawlers to fish at any one time in specific areas of Iceland's 200-mile zone. For the period of the agreement, Britain's catch could amount to

35,000 metric tons, a far cry from the 130,000 metric tons a year caught in 1975. Even then, British cod imports amounted to \$32 million.

Iceland's fishing industry is essential to its economy, accounting for more than 90 per cent of its gross national product. However, the agreed-to fishing restriction is extremely costly to the British. It is estimated that one-half of Britain's Icelandic fleet will have to be dry-docked. Only a few of the trawlers can be converted to other uses, such as supply vessels for North Sea oil rigs.

By the December deadline, an EEC common fisheries policy is expected to replace the bilateral agreement. Additionally, Iceland may well have the support of the U.N. Law of the Sea Conference if the nations attending come out strongly in favor of a 200-mile limit.

Mexico

In accordance with its recent constitutional provision allowing for a 200-mile exclusive economic zone, Mexico has closed off its coastal waters to foreign fishermen. The policy of Mexicanization of its coastline will still allow foreign flag vessels within 200-miles of the coast, but only by Mexican permit, which must be purchased.

Mexico's amendment gives the Government exclusive control over all exploitation within the 200-mile zone, including harvesting of marine life and minerals. While Mexico is presently in the process of negotiating with the United States and Cuba to establish their fishing operations within the zone, such arrangements are temporary. Mexico's goal is an eventual total exclusion of foreigners from its economic zone.

Mexico has completed talks with both Cuba and the United States resulting in agreements to reduce their shrimp fishing operations in the Gulf of Mexico. The agreements will reduce the foreign catch of shrimp by 40 per cent next year, allowing 2.8 million tons for the United States and 2.19 million to Cuba. According to the pact, American presence in Mexican waters will be gradually reduced through 1980, when foreign fishing is to be phased out completely. After 1979, only Mexican fishing boats will be authorized to operate in Mexican territorial waters.

The money earned by Mexico from foreign license fees, estimated at \$80 per vessel and 5 per cent of the dockside value of the catch, will be invested in a bigger Mexican fishing fleet. By increasing domestic catch and encouraging local processing, Mexico hopes to achieve its goal of total independence by 1980.

Meanwhile the U.S. Coast Guard will monitor but not interfere with Mexican enforcement of the new fishing zone. The American fishing industry is quite concerned with the Mexican regulations, and estimates that many fishermen will have to turn to another means of livelihood.

Peru

Peru is currently battling to save its fishing industry. The newly created Peruvian Institute of the Sea (IMARPE), a scientific body empowered to make decisions on when and where to fish, recommended that Peruvian anchovy fishing be resumed. After three years of near disastrous fishing seasons, IMARPE predicts that the 1976 anchovy catch will reach five million tons and earn Peru \$150 million.

In an effort to stabilize and modernize the industry that supplies nearly a third of Peru's foreign exchange earnings, Peru has begun a program of subsidies to local fishermen. The backbone of the program is a government-sponsored housing project that is unique to Latin America. The first one, called the City of the Fishermen, is a complex of 2,300 houses located outside the port of Callao. The resident fishermen pay 25 per cent of their monthly salaries to the government to pay off their housing loan. In addition, the nationalized fishing industry provides the fishermen with a base pay of \$132 each month during times when fishing is forbidden.

United States

The Fisheries Conservation and Management Act of 1976 (the Act), which extends the exclusive fishing zone of the United States to 200 miles, is scheduled to take effect March 1, 1977. The Act requires that any foreign country wishing to fish within the U.S. 200-mile zone must have a Governing International Fisheries Agreement (GIFA) with the United States. The GIFAs are intended to be agreements in principle between two nations specifying gear, allowable catches, seasons, areas, and other pertinent provisions.

The Soviet Union has announced that it considers the U.S. action to declare a 200-mile fisheries zone to be in direct contradiction to the efforts taking place at the U.N. Law of the Sea Conference. The Soviet Union's concern is that other nations will move to acquire ocean space, with the fear that such acquisition will be total, and not simply zoning for such limited purposes as restricting foreign fishing, as in the case of

the United States. On the other hand, the United States is negotiating its first GIFA with Poland and future negotiations with other countries are expected.

The Coast Guard is developing a plan for enforcement of the new extended zone which will utilize a mix of ships, aircraft, and satellite assistance. Estimates of the cost of enforcement during the first year are upwards of \$20 million.

In other developments, the United States filed formal notice of its intent to withdraw from the International Convention on the Northwest Atlantic Fisheries (ICNAF). The notice is intended as compliance with the new U.S. Fisheries Conservation and Management Act, under which all fisheries negotiations must be concluded through bilateral negotiations.

MARINE MAMMALS

The U.S. National Marine Fisheries Service (NMFS) has set a limit on the number of porpoises that may be killed by the U.S. tuna fleet this year. The maximum quota of 78,000 represents a realistic estimate of the number of porpoises the U.S. fleet will kill this year, and is a significant reduction from previous years. If and when that number is reached, all U.S. fishing on porpoise schools will be immediately stopped. In practice, NMFS statistics show a 55-60 per cent reduction in this year's porpoise mortality by the tuna fleet as compared to last year.

As reported in 8 *Law. Am.* 537, 540 (1976), the United States initiated a criminal action against two men who allegedly captured twenty-one dolphins in Bahamian territorial waters and on the high seas. At the conclusion of the trial of one of the defendants, the judge imposed a prison term of 90 days for violations of the Marine Mammals Protection Act. The charge was the first of its kind, and an appeal is planned. The outcome of this test case will be of great interest to both environmentalists and the tuna industry.

The International Whaling Commission (IWC) voted to cut world whaling quotas for the 1976-1977 whaling year. The IWC total quota for the season represents a 40 per cent reduction from those of last year. Due to the dramatic decrease in the allowable whale catch, the question arises whether the Soviet Union and Japan will formally object to the decision and thus free themselves from compliance. The reduction will probably

have the greatest impact on the Soviet fleet, which last year took more sperm whales from Antarctic waters than the total allowed all whaling nations for the coming year.

Meanwhile, three members of the Canadian anti-whaling organization, the Greenpeace Foundation, thwarted Soviet whalers by positioning their small boat between the whaling ships and their prey. The Foundation hopes to again avert Japanese and Soviet whalers during the coming year.

POLLUTION

United States

Perhaps more alarming than ocean-based oil pollution are floating nuclear plants (FNP's). Death and destruction from a major accident at an offshore FNP would most likely exceed the damage from a similar accident at a land-based plant. The Nuclear Regulatory Commission (NRC) is holding licensing hearings on a proposal by Offshore Power Systems, Inc. to build eight FNPs off the East and Gulf coasts of the United States. The proposed plants would be built on huge floating platforms, 400 yards square, and moored to caissons anchored in the seabed floor. The platforms would be located two to three miles offshore. While risks of contamination to air and water would be no greater than on land, concern has focused on the dangers of a core meltdown at sea. During an accidental meltdown, several hundred tons of radioactive molten metal, at high temperatures, would break or seep through the floor of the reactor and then spread into the surrounding sea, being carried by the current to far-away areas. Before allowing construction of the facilities, the NRC must be satisfied that dangers from a meltdown will be minimized, and that risks such as explosions in nearby ships which could threaten the safety of the FNP can be reduced to acceptable limits.

The New Jersey Environmental Protection Commissioner has indicated that the state would block construction of the world's first FNP off its coast until all possible risks are analyzed. In addition to considered risks such a core meltdowns, novel dangers unknown to land-based plants must be studied in light of the innovative technology for the floating plants.

Congressional hearings, meanwhile, have revealed that thousands of tons of "low level" nuclear wastes are being dumped into the ocean each year, even though scientists are not sure what harm the radioactive debris

might cause. While studies of the wastes dumped into the ocean 15 to 25 years ago show no immediate threat, no one is quite sure what the long-range impact might be. Although an international agreement prohibiting ocean dumping of "high level" nuclear wastes is in existence, there is no agreed upon definition of what constitutes low and high-level wastes. The United States ended ocean disposal of its atomic by-products in 1970; however, many nations, plagued by the lack of suitable on-land disposal sites, are still dumping into the oceans.

OFFSHORE OIL

Brazil

Brazilian technicians have discovered a major new oilfield on the continental shelf off Rio de Janeiro. Estimates of the production capability range from 240 to 800 million barrels of oil. The new oilfield is the largest oilfield in recent Brazilian exploration. Production from the field should be greater than 10,000 barrels per day.

Meanwhile, *Petrobras*, the Brazilian state oil company, has finished a detailed study of six foreign oil company exploration risk contracts. The six proposals will be used on offshore production. The result of this rapid energy development is that Brazil anticipates being nearly self-sufficient in petroleum in the 1980's. Oil production will reach 300,000 barrels a year at the end of 1977, with production close to 500,000 by 1981.

Panama

Drilling of Panama's first Caribbean offshore exploratory oil well should begin by the end of the year. The site will be 30 miles off the coast, adjacent to Costa Rica. The area, previously declared not to be commercially viable, is now considered to be economically profitable, especially in light of petroleum prices and modern drilling and pumping techniques. If productive, the wells could rapidly expand Panama's economy.

United States

The issue of offshore petroleum resources continues to generate conflict in the United States. The Chairman of the House Ad Hoc Select Committee on the Outer Continental Shelf has moved to forestall the implementation of the mid-Atlantic oil and gas leases by the Department of the

Interior. The action was based on the belief that the House would favorably pass the Outer Continental Shelf Amendments of 1976. If signed into law by the President, the amendments would drastically change the manner in which sales of offshore oil and gas leases are conducted. Congressional review and revamping of policies and procedures for managing outer continental shelf oil and gas resources has been spurred on by intense public sentiment concerning offshore drilling activities.

In legal action, experts testified that a routine pipeline leak during drilling off the New Jersey coast could spill a million gallons of oil into the ocean before it could be detected. The spill, helped by mild winds, could be blown onto shoreside beaches in a matter of hours. The environmental groups initiating the suit aimed at blocking the first sale of Atlantic leases to oil companies contend that statements issued by the Department of the Interior do not minimize the possibility of spills, and are thus in violation of the National Environmental Policy Act. If the present court action is successful, it will force both the Interior Department and the oil companies to develop better total-spill cleanup systems.

Nevertheless, the Department of the Interior has moved ahead with the sale of oil and gas drilling leases off the Atlantic coast. Bids for more than 800,000 acres of potential oil and gas deposits 47 to 92 miles from the New Jersey and Delaware coasts were opened in mid-August. The total amount of high bids was more than \$1.1 billion. The underwater sites are estimated to contain between 400 million and 1.4 billion barrels of oil and from 2.6 to 9.4 trillion cubic feet of natural gas. Further legal action concerning the sale is pending, and if it is determined that the Department of the Interior ignored possible environmental damage in violation of the law, the bids opened will be declared void.

In an effort seemingly designed to appease environmental concerns while spurring offshore exploration for energy sources, the Coastal Energy Impact Bill was signed into law. The measure allows federal government financial assistance to communities off the ocean coasts whose populations might expand because of energy projects. The Bill offers coastal municipalities two sets of incentives to allow development of offshore oil reserves: loans are to be provided to help communities cope with additional public facilities needed due to the increasing population associated with new energy exploration, and assurances that any offshore energy program by petroleum and gas companies must comply with the municipality's coastal zone management plan. At the present, virtually all of the nation's coastal states are developing plans to protect their coastal environment. The Bill,

drawing favorable responses from local governmental officials from around the country, drew mixed reactions from environmentalists, who are concerned that the incentives could be used as a tactic for persuading localities to acquiesce to energy exploration.

Venezuela

Venezuela's end-of-the-year oil exports will average more than two million barrels a day, due largely to the offshore oil reserves. The state-owned oil industry, the fifth largest in the world, will invest close to \$500 million in an effort to further increase oil exploration and development, and to modify the state's 1.5 million barrel per day refining capacity.

RESEARCH AND DEVELOPMENT

Satellite Service

The maritime communications satellites, Marisat I and II, are now in operation and working well. Telephone service to ships in the Atlantic Ocean through Marisat I is in full operation. However, teletype service through the communications system is being held up due to the reluctance of international communications services that share the satellite to permit use of their land-based teletype machines to communicate through satellite channels of other carriers. The two satellites provide the first direct, all-weather communications to ships at sea through teleprinter and voice circuits.

Kelp Farms

Scientists have begun efforts to produce methane gas and nutrients from kelp off the coast of Southern California. The quarter-acre test module, positioned about 60 feet below the surface, is testing the practicability of a chain of huge offshore kelp plantations that would produce abundant quantities of methane gas for fuel and nutrients for food crops and livestock. The nitrate-rich ocean water accelerates the proliferation of the brown kelp that abounds in coastal areas. If successful, scientists envision within fifteen to twenty years a linkup of ocean energy farms. In offshore installations, the kelp will be forced through a conduit to huge vats seeded with bacteria to produce methane gas. Other parts of the processing plant will draw out nutrients for animal feed and organics for fertilizer. Recent tests have shown that a diet consisting of 40 per cent dried kelp was as nutritious for sheep as alfalfa.